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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE LOUIS RODRIGUEZ, Defendant and Appellant.	E030401 (Super.Ct.No. FMB03711) **ORDER MODIFYING OPINION AND DENIAL OF PETITION FOR REHEARING** [NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. The opinion filed in this matter on June 7, 2005, is modified as follows:

1. On page 1, the words "CERTIFIED FOR PUBLICATION" are replaced with the words "CERTIFIED FOR PARTIAL PUBLICATION," and those words on page 1 are followed by insertion of the following footnote:

> * Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication with the exception of Parts II and III of Factual and Procedural History, and Parts I and II of Analysis.

2. On page 2, after the first sentence of the first paragraph (ending with the words "subdivision (a)"), the following sentence is inserted:

Counts 1 and 2 alleged the victim to be defendant's daughter, C., and counts 3 and 4 alleged the victim to be defendant's daughter, I.

3. On page 2, after the first sentence of the second full paragraph (beginning with the words "In January 2003"), the following sentences are added:

> Defendant filed a petition for review with the California Supreme Court. The Supreme Court denied the petition on March 24, 2003; that same day, we issued a remittitur.

4. On page 2, the last sentence of the third full paragraph is deleted, so that the paragraph ends with the words "The People concede this issue."

5. On page 2, after the last full paragraph and before the section heading "FACTUAL AND PROCEDURAL HISTORY," the following paragraph is inserted:

> In the unpublished portion of this opinion, we will discuss the issues set forth in the original appeal and shall affirm the judgment. In the published portion of this opinion, we will discuss the single issue regarding section 667.61; we shall remand this case for resentencing to allow the trial court to exercise its discretion and determine whether consecutive or concurrent sentences should be imposed for counts 2, 3, and 4.

6. The paragraphs commencing with the section heading "FACTUAL AND PROCEDURAL HISTORY" on page 3 and ending with the paragraph commencing "When defense counsel" on page 4 are deleted, and the following are inserted in their place:

FACTUAL AND PROCEDURAL HISTORY

I. Summary

> Defendant, who was 36 years old at the time of trial, was charged with four counts of molesting his two daughters, C. (age 10) and I. (age 8). The acts, which occurred between May of 1999 and December of 1999, consisted of oral copulation, and penile and digital penetration.

Both defendant and the mother of the two children (mother) are blind.

II. Prosecution Case

A. Counts 1 and 2 -- Sexual Molestations of C.

C. testified that she was five or six years old when defendant began to sexually molest her. The molestations began when C. was living in Nevada. In May of 1999, C., I., mother and defendant moved to Yucca Valley, California. While in Yucca Valley, they lived at three different residences: Fox Trails, Mariposa Street, and Lupine Street.

Defendant continued to molest C. about once a week after they moved to Yucca Valley. Defendant touched C.'s vagina with his penis. C. described that defendant would get on top of her while they were both naked and would go "up and down" with his penis between her legs on her "private part." C. testified that defendant put his penis on, but not inside of her "private part." The incidents occurred in her parents' bedroom.

C. also testified that defendant put his mouth on her chest, "sucked" on her chest, and touched his mouth between her legs. Sometimes C. had clothes on, other times she did not. C. could not recall how often this occurred, but it did not happen every week.

After defendant separated from mother and went to live in a house on Hopi Street, C. and I. would visit defendant once or twice a month. C. testified that on one occasion at the Hopi house, defendant got on top of her and his penis was touching her private part. On several occasions when defendant was on top of her and he was "going up and down" on her, C. found "white slimy stuff" between her legs. Defendant was lying on top of C., who was lying on her back; they were both naked. C. testified that similar acts occurred at the Mariposa and Lupine houses. It occurred at least once or twice at the Mariposa house, four to five times at the Lupine house, and once at the Hopi house. The last molestation occurred before Christmas 1999.

C. never told anyone about the molestations because she was afraid defendant would go to jail and she knew what defendant was doing to her was wrong. On one occasion, defendant told C. that he knew what he was doing was wrong, it was a "big sin," it was bad and he was trying to stop. C. testified that defendant told mother about the molestations and told her that he wanted to stop. Mother told C. that defendant wanted to stop. C.

recalled that on one occasion, I. told her that defendant was "doing something sexual to her."

When C. was initially interviewed by an officer about the molestations, she told him that nothing was going on between defendant and herself. She lied because she was scared defendant would go to jail. C. hit I. when I. tried to say "yes" when the officer asked if anything was going on at home between them and their father. In an interview at the police station the following day, C. told the officers the truth as to what defendant was doing to her.

B. Counts 3 and 4 -- Sexual Molestations of I.

I. testified to three different types of acts that occurred when she was eight years old and living at the Lupine house. On one occasion, while she and defendant were in the music room of the house, defendant touched her "private," the front lower part of her body, with his mouth. I. also testified that on another occasion, while she sat on defendant's lap, he was "moving up and down" his "private part" on I.'s "bottom." Defendant and I. were both clothed when this occurred.

I. further testified that she and C. would sometimes sleep in a tent in the living room. One evening, defendant came into the tent. He was naked; he took off C.'s clothes, got on top of C., and started "moving up and down" his "private part" on C., who was lying on her back. I. watched the entire incident. When defendant finished with C., he then got on top of I. and started doing the same thing to her. I. stated that it hurt her when defendant put his "dick" into her "private part" and moved it up and down. After defendant stopped moving, she saw some "yellow stuff" come out of his private part. Defendant took a towel and wiped it off himself and I.

At trial, I. testified that defendant put his private part into her private part a total of four to five times. It would usually occur when mother was out of the house, and I. and defendant were alone.

On one occasion, I. told C. that she did not like having sex with defendant and asked C. to tell defendant to stop it. I. also told mother about what defendant was doing, and her mother "got really mad" at her. I. recalled that after she told mother, defendant moved to another house.

I. testified that she initially lied to the police when she was first interviewed because her sister, C., pinched her, indicating that she should keep it a secret. In her subsequent interviews, I. told the truth.

Defendant admitted to numerous people that he had sexually molested his two daughters. He told mother that he had orally copulated both girls and that he stuck his finger in C.'s vagina. When mother asked defendant why he had molested their daughters, defendant responded that it was better than going out and having an affair. Defendant also told mother it was her fault that he was sexually molesting his daughters because mother did not have sex with defendant. Defendant told mother that he was sorry for what he had done and promised to get help for his problem. Mother did not report defendant to the police because he threatened to kidnap the girls and she feared that she would not be able to locate them because of her visual disability. In October of 1999, defendant told mother he wanted his privacy and moved out of the house.

Defendant also admitted to his neighbor, that he had sexually molested his two daughters. Defendant stated that he began touching his daughters in their "private places" when they were three or four years old. He asked his neighbor not to tell anyone because he was getting help through a "hotline." Defendant told his neighbor that he had to move out of the house because he did have a problem with touching his girls, he was trying to get help, and he felt badly about what he had done. Defendant's neighbor reported the molestations to the police in late December of 1999.

On January 5, 2000, R. C., whose daughter was a friend of defendant's daughters, confronted defendant and mother about the allegations of molestations. Initially, defendant denied the allegations. After mother stated that she was going to tell R. C. the truth, defendant then told R. C. that he had been "molesting the girls" and trying to get help by calling "hotlines," and that he was not having any contact with his daughters. R. C. called the sheriff's office and defendant was arrested.

In January of 2000, a social worker was assigned to investigate the sexual abuse allegations. The social worker's job was to provide services for the children, who had been placed into protective custody. The social worker interviewed mother and defendant to prepare a report to the juvenile court. On February 10, 2000, defendant called the social worker from jail. He was crying hysterically and stated that he was sorry, and did not think that the solution for him was to go to prison. He told the social worker that he needed help rather than serving a long prison sentence. According to the social worker, defendant stated as follows: "He said he was scared, and that he said that he had disclosed to his wife a year ago about the sexual molestation with the daughters, and that he had mentioned it again to her when he left the home during their last separation. [¶] He said the reason

he left the home was in an attempt to stop the sexual molestation, and that he also explained to the girls why he was leaving the home." Moreover, defendant stated, "all of these years I've been carrying around with this, and all I need is help." Furthermore, defendant stated "that he had disclosed that he had been molesting his daughters to his girlfriend, and that the girlfriend had referred him to the crisis hotline."

III. Defense Case

Defendant testified and denied that he had sexually molested his daughters. He also denied that he had ever told his wife that he had sexually molested the girls. Defendant claimed that mother became angry after defendant told her he was unhappy with the marriage and moved out of the house. Soon after, defendant commenced a new relationship with another woman. According to defendant, the accusations that he molested his two daughters were made by mother after she found out that defendant had a girlfriend, and that he wanted a divorce. Defendant claimed that mother falsely accused him of molesting the girls in an effort to prevent defendant from obtaining joint custody of them.

Defendant also claimed that his daughters had been coached and brainwashed into making the allegations against him. Moreover, defendant denied telling his neighbor, R. C., or anyone else that he had molested his daughters.

Defendant further testified that his telephone conversation with the social worker was taken out of context and misunderstood. He spoke with the social worker about placement of the children. She was asking for personal information, which he was unable to provide. In this context, he told her that he was sorry. Defendant testified that he told the social worker that he needed help, and that he had called a "father's rights" hotline to inquire about obtaining custody of his children. Defendant testified that he told the social worker that he needed help for the personal problems that he had been carrying around for the past years. These problems were unrelated to the allegations of sexual abuse.

IV. Sentencing Hearing

At the sentencing hearing, defense counsel argued that although the trial court was mandated to impose a sentence of 15 years to life on each of the four convictions, the trial court had the discretion to order concurrent sentences. The prosecution, however, argued that (1) at least two of the sentences had to be consecutive, one for each named victim; and (2) the

court could impose concurrent sentences only if the offenses were committed on the same occasion – the prosecution took the position that the offenses were committed on separate occasions.

The trial court adopted the prosecution's interpretation of the law and made the finding that it had no discretion in the matter. The court, therefore, found that it had to impose consecutive sentences on all four counts – 15 years to life for each conviction for a total sentence of 60 years to life. The court stated: "[S]o I will make the finding that, to reserve it for appeal, the court feels it does not have the ability to exercise its discretion in sentencing under these circumstances concurrently as to terms 2, 3, and 4 . . . ."

When defense counsel sought clarification, the trial court repeated that it had no discretion but to impose consecutive sentences on all four counts. Thereafter, the trial court imposed consecutive sentences on all four counts.

6. On page 4, immediately after the heading "ANALYSIS," the following subheadings and paragraphs are inserted:

I. Any Alleged Errors Were Harmless Beyond a Reasonable Doubt

Defendant contends that the prosecutor committed misconduct by engaging in improper closing and rebuttal arguments to the jury. Specifically, defendant argues that the prosecutor (1) improperly "vouched for the strength of the People's case," (2) argued inadmissible and prejudicial evidence, (3) disparaged defense counsel with non-verbal gestures in front of the jury, and (4) improperly appealed to the passions of the jury. In the alternative, defendant contends that he was denied effective assistance of counsel based on his trial counsel's failure to object to many of the alleged instances of prosecutorial misconduct.

Defendant also contends that the trial court committed prejudicial instructional error when the jury, in response to certain statements made by the prosecutor during closing argument, as follows:

"Ladies and gentlemen, again, the district attorney is speculating. It wasn't evidence in this case.

"Ladies and gentlemen, I have to explain to you the reason that I have to protect the record in this case is because if I do not and this case is

reversed, it comes back, 12 other jurors are going to have to go through this again. Don't hold this against either side because I ruled it is not."

We need not address the substance of either argument because, even if there were prosecutorial misconduct or instructional error, the errors were harmless under any of the harmless error standards for review. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 178; *People v. Prettyman* (1996) 14 Cal.4th 248, 272; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

In this case, the evidence of defendant's guilt was overwhelming. The testimony of both C. and I. was credible -- it was specific and detailed as to the type of sexual acts, and when and how often the acts occurred. Moreover, defendant made incriminating admissions to mother, to his neighbor, R. C. and the social worker. As outlined above, defendant admitted that he molested his daughters to the four different individuals.

Notwithstanding the solid evidence against him, defendant argues that the errors were not harmless because (1) when the children were first interviewed by the police, they denied that defendant had molested them; and (2) when mother was interviewed, she also denied that defendant had molested her daughters. Defendant's argument is without merit. C. explained that she had initially lied to the police regarding the molestations because she was afraid their father would go to jail. I. lied because C. indicated to her that they should not reveal the molestations. Nonetheless, the two sisters came forward with the truth immediately thereafter. Moreover, although mother initially told the interviewing officer that defendant was not molesting the children, she thereafter admitted that "that they were being molested in the past but that it had stopped because [defendant] moved out."

It was for the trier of fact to judge the credibility of the initial denials by the victims and mother. Such initial denials are common, given the enormous pressure not to disrupt the family unity. In addition, however, three *independent* witnesses testified that defendant admitted to them that he had molested the two girls. In response, defendant contends that his "purported inculpatory statements [were] either fabricated by those with a motive to lie or, when considered in proper context, they were not at all inculpatory." The evidence fails to show that either a former neighbor, or R. C., a parent of a friend of the children, had any such "motive to lie." As to the social worker, defendant argues that the social worker took his comments out of context. He claims that he admitted only that he had personal problems, unrelated to the allegations of sexual abuse, "that he had

been carrying around for the past years." The social worker, however, testified that "[a]s he was speaking, I was writing and quoting verbatim everything that he was saying . . . ." According to her recollection, defendant admitted that he had been molesting his daughters, that mother knew about the molestations, and that he had admitted the molestations to his current girlfriend who encouraged him to receive help. It is difficult to fathom how the social worker -- an objective party to this criminal proceeding -- could have misunderstood defendant's candid admissions.

In sum, because of the overwhelming evidence of defendant's guilt -- chiefly defendant's *own admissions* to numerous independent adult witnesses -- we find any alleged errors to be harmless under either the *Watson* or *Chapman* standard of review.

II. The Alleged Cumulative Errors Were Harmless

Defendant urges us to apply the cumulative error doctrine on the ground that the alleged errors had the cumulative effect of denying him the right to a fair trial. The People argue that defendant "received a fair trial, in which the evidence of [defendant's] guilt was substantial and compelling. [Defendant] has failed to show there was [a] cumulation of errors warranting reversal of the judgment. [Citation.]" We agree.

The premise behind the cumulative error doctrine is that while a number of errors may be harmless taken individually, their cumulative effect requires reversal. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 ["'[a] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error'"].)

In this case, even when evaluated collectively, any alleged errors that occurred were harmless. (*People v. Bunyard*, *supra*, 45 Cal.3d at p. 1236.)

7. On page 4, subheading number I ("The Trial Court Erred When It Stated That It Had No Discretion to Consider Concurrent Sentences Under Section 667.61") is renumbered as subheading number III.

7. On page 7, the publication instruction is modified to read "CERTIFIED FOR PARTIAL PUBLICATION."

/s/ Ward
J.

We concur:

/s/ Ramirez
P. J.

/s/ Richli
J.